

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

4 ROBERT LOBEL,)
5 Plaintiff) Civil Action
6) No. 15-13803-FDS
7 vs.)
8 WOODLAND GOLF CLUB OF)
AUBURNDALE,)
Defendant

10 BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 2
1 Courthouse Way
Boston, MA 02210

February 1, 2017
11:00 a.m.

1 APPEARANCES:

2 For The Plaintiff:

3 Jeffrey Denner Associates, P.C., by MICHAEL V. LONGO,
4 ESQ., 4 Longfellow Place, Boston, Massachusetts 02114;

5 For the Defendant:

6 Foley & Lardner, LLP, by DONALD W. SCHROEDER, ESQ.,
7 111 Huntington Avenue, Suite 2500, Boston, Massachusetts
8 02199;

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Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.,
by ERIN C. HORTIN, ATTORNEY, One Financial Center,
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PROCEEDINGS

2 THE CLERK: All rise. Thank you. Please be
3 seated. Court is now in session in the matter of
4 Robert Lobel vs. Woodland Club of Auburndale,
5 Civil Action Number 15-13803.

8 MR. LONGO: Good morning, your Honor,
9 Michael Longo on behalf of the plaintiff, Robert Lobel.

11:01AM 10 THE COURT: Good morning.

11 MR. SCHROEDER: Good morning, your Honor,
12 Don Schroeder and Erin Horton on behalf of Woodland Club
13 of Auburndale.

14 THE COURT: Good morning, this is a hearing
15 on cross-motions for summary judgment. It's not clear
16 to me who ought to go first, but traditionally it would
17 be the defendants, so, Mr. Schroeder, I think I'm going
18 to hear from you first.

19 MR. SCHROEDER: Thank you, your Honor. Your
11:01AM 20 Honor, should we limit our initial discussion on our
21 motion and let counsel respond?

22 THE COURT: I'll let you argue it anyway --
23 I mean, they're cross-motions but the same subject
24 matter, the same cases, same statute. You can address
25 it any way you see fit. If you want to just handle your

1 motion, let them respond, hear their motion.

2 MR. SCHROEDER: It might make sense
3 procedurally, your Honor, if that's okay with the Court.

4 THE COURT: That's fine.

5 MR. SCHROEDER: Thank you, your Honor. As
6 the Court is well aware, Woodland Golf Club has filed a
7 motion for summary judgment based upon a limited issue,
8 and the limited issue is whether or not Woodland is a
9 private club as constituted under the law, and,

11:02AM 10 therefore, exempt from Title III of the ADA.

11 The ADA states the provisions of this
12 subchapter, Title III of the ADA, shall not apply to
13 private clubs or establishments exempted from coverage
14 under Title II of the Civil Rights Act, and just to cut
15 to the chase, there are eight factors, and I think both
16 sides agree, there are eight factors under this
17 *Lansdowne* case that are annunciated, and both parties
18 have briefed this, and I'm going to try to focus on the
19 germane ones that there's been some response on.

11:02AM 20 There's eight factors, four of which though
21 I would submit to the Court are undisputed in favor of
22 Woodland: The history of the organization, the purpose
23 of the club's existence, whether the club is for profit
24 or not profit and the formalities of the club, and so
25 I'd submit just from out of the gate that four out of

1 the eight are basically conceded by the plaintiff, and
2 the plaintiff does state in their papers that no one
3 category is more dispositive than another with the Court
4 looking to the sum of all parts to make its
5 determination. Well, that leaves the other four
6 categories.

7 Shifting gears to those four, the first one
8 being genuine selectivity of the admissions process,
9 paragraphs 20 through 25 and 27 through 49 of our
11:03AM 10 statement of undisputed facts, the plaintiff basically
11 admits for one of three reasons: One, either they admit
12 that's what the bylaws state, so there's no controversy
13 there; or they admit because the plaintiff has no basis
14 to deny; or, the third one, based upon opinion and
15 self-serving declaration of the club GM, David
16 Garfinkel, and we'd submit that there's nothing that
17 prevents the parties from submitting an affidavit which
18 supplements the record on questions that weren't asked
19 of Mr. Garfinkel during his deposition, so for all those
11:04AM 20 reasons, those are all three basic admissions to the
21 genuine selectivity of admissions process statement of
22 facts.

23 In going through very quickly the sublist of
24 factors in Lansdowne on this particular factor, there's
25 five subparts:

1 There is the substantiality of the
2 membership fee. Undisputed, \$55,000 initiation, \$10,000
3 to \$14,000 per year in annual dues, assessments, et
4 cetera for a family. Numerical limit on club
5 membership. There's 350 people they limit on that.
6 Senior resident and honorary life membership people, the
7 people that can vote on things, there's 225, and a
8 limited membership is 55. That second subfactor is met
9 as well.

11:05AM 10 Membership control over selection of new
11 members. This is a procedural gauntlet that I think
12 satisfies the fact that the members are intricately
13 involved in this process. First of all, you can't even
14 get an application unless a member goes to the
15 membership committee to get the formal application to
16 give to the potential applicant.

17 On top of that, you then have the fact that
18 the individuals who filled out a detailed application,
19 there's a first proposer, second proposer and third
11:05AM 20 proposer. What really that boils down to is three
21 questionnaires, detailed questionnaires, and two
22 recommendations. There's then the interview by the
23 membership committee, eight people, recommendation to
24 the full membership committee, the names posted on the
25 internal website and then reports of the full board.

1 All these procedural items and parts to the
2 application process are not only spelled out in the
3 bylaws but were certainly spelled out in the record, and
4 it has gone undisputed that that is how things proceed,
5 then there's a report to the full board, and the person
6 is given a one-year provisional kind of a probationary
7 appointment, and then after that one year, they can be
8 admitted as full members or potentially rejected.

9 The fourth subfactor, formality of clubs
11:06AM 10 admissions process. As I said, it's really hard to get
11 an application. In fact, there's even a restriction on
12 the member who can do it. You've got to be a member in
13 good standing for three years before you can even ask
14 for an application.

15 It's undisputed despite the public Facebook
16 page or website that the club does not actively seek new
17 members externally and does not advertise internally or
18 externally for new members, and as previously stated,
19 you've got to go through this maze, if you will, to make
11:06AM 20 sure you get an application and that it gets in front of
21 the right people and that you have a cadre of people
22 that are going to support you, not just one member but
23 three.

24 One of the things that differentiates this
25 case from *Lansdowne* as well as the *Ocean Club* cases is

1 that those processes, those application processes were
2 pretty basic. It was, you know, kind of akin to my son
3 applying for a job for the summer, it wasn't asking for
4 a lot of information at the end of the day.

5 Here, per John Tully's affidavit, he was the
6 chair of the membership committee, which we submitted as
7 well as a copy of the application. We try not to put
8 too many things in the public record just because it is
9 a private club, but we did it because we wanted to
11:07AM 10 demonstrate and establish for the Court that this is
11 not, you know, some short form application where you
12 just put your name, address and your spouse and
13 children.

14 It highlights the fact that there are a
15 couple of things that are looked at in detail through
16 the membership process, whether or not somebody is
17 civically-minded and engaged in community affairs,
18 charitable activities, active participation in other
19 clubs, and then strong personal, social and business
11:08AM 20 connections with Woodland members, and the application
21 also asks about the applicant's family, profession, and
22 there's a place, a one-page space left for the person to
23 basically say why they would really like to be a member
24 of the club.

25 And this goes hand in hand with one of the

1 things that was raised by plaintiff in their brief, and
2 if you look at the *Chicago Club* case, there's a great
3 quote in that case with respect to whether or not
4 there's actual objective criteria. There's subjective
5 criteria, and the subjective criteria are, in fact, the
6 things that I just announced, the civic charitable
7 active participation in clubs, the personal, social and
8 business parts of things.

9 As announced by the Court in the Seventh
11:09AM 10 Circuit decision, "Members of a private club share more
11 than interests or agenda, they often share values as
12 well. Part of the value system that binds members of a
13 private club is a common understanding of who belongs in
14 the circle and who does not. A private club is a group
15 of individuals who imagine the membership as a
16 personification of whatever priorities or interests the
17 club professes to embrace."

18 And this is much like the *Bommarito v.*
19 *Grosse Point Yacht Club* case where the Court ruled in
11:09AM 20 favor of Title III exemption applying as a private club.
21 There's a written application, sponsorship by three
22 current members, posting of the candidacy, consideration
23 by the Board of Directors, and we'd submit, your Honor,
24 that that is consistent with how things operate at
25 Woodland. That's that factor.

1 The next -- the second factor that deserves
2 some mention is the membership control over operations,
3 and we'd submit that this is consistent with the
4 *Pappion, Bommarito and Kuk'o Golf Club* cases.

5 Here, you have facts annunciating in
6 paragraphs 5 through 19 of our statement of undisputed
7 facts, which are admitted. It's admitted that there's a
8 board structure, it's admitted that there's monthly
9 meetings by the board. So many nonprofits do quarterly
11:10AM 10 meetings, certainly the ones that I'm involved in, if at
11 all, quarterly.

12 These are monthly meetings. There's four
13 officers, nine board members, thirteen in total, there's
14 ten standing committees, and the board is in charge of
15 the general business affairs of the club.

16 Now, plaintiff submits that Mr. Garfinkel as
17 the club general manager somehow was in charge of
18 everything, the members really didn't have anything to
19 do with anything; however, Mr. Garfinkel's deposition
11:10AM 20 testimony is to the contrary.

21 In fact, when asked, as the general manager
22 of Woodland, briefly describe what your job duties are,
23 his answer was, "I work and serve the Board of Directors
24 in putting in place their policies and operating the
25 club's further standards."

1 And, in fact, when you look at the decision
2 that is part of this case, the major decision that is
3 part of this case, that the denial of allowing the
4 SoloRider on the bunkers and greens of the golf course,
5 you can see that Mr. Garfinkel is just one cog in the
6 wheel of this process.

7 The first request was made through the
8 greens committee chairman, John Mahoney by
9 Mr. Chervinsky, then that appeal went to the board
11:11AM 10 president, Mr. Vin Farina, and then the board did a
11 test, conducted a test, five people attended.

12 Mr. Garfinkel was one of the five, and all
13 testified that they saw mechanical damage, tearing up of
14 the turf, prominent markings, and I'll deal with that in
15 a fundamental alteration argument relating to
16 plaintiff's motion, but the point of the matter is the
17 ultimate decision, as Mr. Garfinkel testified to, and
18 there's no evidence to the contrary, in fact, everybody
19 testified to, this was a group decision.

11:12AM 20 It involved Mr. Garfinkel, Mr. Mucciarone,
21 the in-house counsel as well as Mr. Farina and
22 Mr. Mahoney, so you actually had three out of five of
23 the people that were actually part of that joint group
24 decision who were actually members of the club.

25 Shifting to the nonmember access issue, to

1 put things in context, I think the *Jankey* and *Pappion*
2 cases will highlight the fact that determining whether
3 or not somebody meets the private club exemption under
4 Title III of the ADA is whether the facility is open
5 indiscriminately to other members of the general public.

6 *Pappion* states that facilities "intended for
7 or restricted to the use of a particular person or group
8 of class or class of persons not freely available to the
9 public" are private and exempt from the ADA, and that
10 was cited in the *Chicago Club* case as well.

11 THE COURT: It's not just indiscriminate, it
12 could be regular, right?

13 MR. SCHROEDER: It could be regular, your
14 Honor. One of the issues then is on that point, while
15 regular use -- in fact, *Pappion* said that while regular
16 use would cut against that factor, "allowing owners to
17 bring guests onto the property does not strip ADA
18 exemption as a private establishment.

19 *Jankey* goes into the issue of whether or not
11:13AM 20 guests are permitted unfettered use of the facilities,
21 so you're correct, if there is regular use by
22 nonmembers, that that would cut against that, however,
23 when you look at the *Bommarito* case, for instance, the
24 Court mentioned the fact that there was the musky
25 fishing charity event, the annual yachtsman weekend, and

1 that they had charity events and boat shows, but that
2 did not demonstrate that the defendant's facilities are
3 or were opened or advertised for public use, and, in
4 fact, they allowed for banquets, and the Court went on
5 to say that the fact that the member's sponsor is a host
6 of those nonmember events, which are ultimately paid by
7 a nonmember organization, does not have any impact on
8 private status.

11:15AM 20 The fact that the club on occasion sponsored
21 events that included members of the public did not
22 qualify as destroying its private nature.

23 THE COURT: I want to focus on that, right.
24 I mean, here, Woodland, first off, there's things like
25 weddings and banquets, but there's also golf

1 tournaments, right, maybe a dozen or two dozen a year,
2 somewhere in that neighborhood?

3 MR. SCHROEDER: Yes, your Honor. On the
4 issue of weddings, there were five weddings that were
5 member-sponsored in two years, so just on that issue.

6 THE COURT: All right.

7 MR. SCHROEDER: With respect to the golf
8 events, there were 16 golf events in 2014 and 13 in
9 2015. All of them for the most part, most of them
10 occurred not during normal business hours. All were
11 from nonprofit religious organizations or charities, and
12 I'd submit to the Court that on this point that this is
13 de minimis in the grand scheme of things.

14 Woodland, there's no question in the
15 statement of undisputed facts, and plaintiff agrees to
16 this, Woodland allows members to invite guests on a
17 limited basis. With respect to other points that are
18 raised in the record, in order for an outside person,
19 organization and/or business to hold an event at
11:16AM 20 Woodland, they must have a member sponsoring that event.
21 You just can't come in off the street and have a wedding
22 or have a golf event.

23 THE COURT: But once the golf tournament is
24 set, some of them, presumably, are open more or less to
25 members of the public, right, in other words, somebody

1 could show up for the annual Newton golf fundraising
2 event, right?

3 MR. SCHROEDER: Conceivably they could, your
4 Honor, yes.

5 THE COURT: How does that intersect with the
6 *Martin* case? I mean, isn't that tournament itself a
7 public thing?

11:17AM 8 MR. SCHROEDER: I think the issue in the
9 *Martin* case, and why it's distinguishable, the *Martin*
10 case was not dealing with it, even though they made the
11 argument at the lower court, they punted on that
12 argument at the Appeals Court and Supreme Court level.

13 The *Martin* case deals with the PGA tour, not
14 the actual golf club, which is what we're dealing with
15 here. There, it was whether or not the PGA tour fit
16 within the private club, and people said, the lower
17 court said no, this is a commercial organization, it's a
18 business enterprise, it can't fit within the club.

19 So I'd submit to you that that case deals
11:17AM 20 with just the PGA tour, not the actual private club
21 exemption under the ADA, which is before you here today.

22 There's no doubt that there has been
23 nonmember access by individuals that are not members of
24 the club, the question is though is that number, 16 in
25 one year, 10 in another, and, by the way, those are all

1 member-sponsored events for religious and nonprofit
2 organizations.

3 THE COURT: But, still, there's only 52
4 weekends a year, so, you know, if we're coming up with a
5 numerator and denominator, 16 out of 52 for that
6 particular year, it's not 365, nobody has a golf
7 tournament on Tuesday in January, right?

8 MR. SCHROEDER: Not here, your Honor.

11:18AM 9 THE COURT: Fair enough, all right, no one

10 in Massachusetts does that.

11 MR. SCHROEDER: The other thing, your Honor,
12 there's a gating issue, too, is that Mr. Garfinkel and
13 the board decide which events get to happen at the end
14 of the day. This is not something where I get to decide
15 I want to have an event there and I get to have an
16 event.

17 The other thing is the club is generally
18 closed on Mondays, and that's when they would schedule
19 those nonmember events throughout the year.

11:18AM 20 THE COURT: They are on Mondays?

21 MR. SCHROEDER: Yes.

22 THE COURT: Okay.

23 MR. SCHROEDER: So there's a specific time
24 period when they would host them, not during normal
25 business hours, which is the Monday when the club is

1 generally closed, so I'd submit that if you look in the
2 grand scheme of things, those numbers do not justify the
3 basis for claiming that nonmember access is somehow
4 regular use of the club.

5 In fact, it's limited use of the club
6 throughout the year for these special organizations,
7 many of them charities and religious organizations that
8 members had an affiliation with, and so for that reason,
9 I would submit the nonmember access is fairly limited in
10 the grand scheme of things.

11 The third issue, your Honor, or I should say
12 the fourth issue, the four factors that are left open
13 for discussion here because the other four are
14 undisputed, would be whether the club advertised for
15 members.

16 There's no doubt there was an old website
17 that existed. It was never relied upon. It was never
18 used as a basis for any revenue generated by the club.
19 It's undisputed that it had no bearing on how the club
11:20AM 20 operated. It could leave the impression that the club
21 actually did hold weddings or golf tournaments if you
22 called them up, but Mr. Garfinkel has offered undisputed
23 testimony, not just in his affidavit, but under oath as
24 well in his deposition, that that is not how it worked,
25 and, in fact, they revised the website.

1 The other argument by plaintiff's counsel is
2 that, well, there is a publicly viewable Facebook page.
3 Well, I don't believe that that constitutes advertising
4 in and of itself, and I'm probably the only one that
5 doesn't have my own Facebook page, whether it's public
6 or not public.

9 MR. SCHROEDER: But at the end of the day,
10 whether or not they have a public website, they actually
11 concede the fact that there is a private website for
12 members only. The fact that they announce stuff on a
13 Facebook page doesn't satisfy the standard of whether or
14 not there's advertising or not, so when you look at all
15 eight factors in total and four are conceded by the
16 plaintiff already out of the box, you then look at the
17 other four, I'd submit that the record establishes
18 without a doubt, no genuine issue of material fact that
19 the club satisfies the other four factors as well to
20 become -- to be considered a private club exempt from
21 Title III of the ADA.

22 | THE COURT: All right.

23 MR. SCHROEDER: Thank you.

24 THE COURT: The issue about the cart itself,
25 is that part of your affirmative motion itself, right,

1 as opposed to a defense of their motion? In other
2 words, you say he didn't ask for the cart and the cart
3 damages the greens and so forth?

4 MR. SCHROEDER: That would be our
5 opposition.

6 THE COURT: Why don't I hear from Mr. Longo.
7 Why don't you respond and then address whatever
8 additional issues you want. Mr. Longo.

9 MR. LONGO: Thank you, your Honor. So first
11:22AM 10 and foremost, an issue that was raised in our five
11 papers and I think is first and foremost with respect to
12 the argument being proffered by my Brother is that the
13 private club exemption is an affirmative defense. It's
14 a statutory exemption to the rule, as you read from the
15 statute itself, therefore, it must be pled as an
16 affirmative defense.

17 Woodland's answer, if you look at it, it's
18 Docket Number 8 does not plead that as a defense, and in
19 short, that bars them from asserting it now. The case
11:22AM 20 is *Jackson v. Seaboard*, and in that case, the District
21 Court held that Federal Rules of Civil Procedure 8(c)
22 requires that, and I'm quoting, "In a pleading to a
23 proceeding, a party shall set forth affirmatively any
24 other matter constituting an avoidance or affirmative
25 defense. The failure to include an affirmative defense

1 in the answer or have it included in the pretrial order
2 of the District Court that supercedes the pleadings will
3 normally result in a waiver of the defense."

4 THE COURT: But that strikes me as odd. I
5 haven't read the case. You know, lots of statutes out
6 there, hundreds, thousands of them say this covers A, B,
7 C and D but not E, and you're saying that any time that
8 there would be an exception like that, any carve-out,
9 that would have to be pleaded as an affirmative defense
10 like laches or statute of limitations?

11 11:23AM MR. LONGO: Correct, and there's a case,
12 *Kalani vs. Castle Village, LLC*, which is out of the
13 District Court in California, which actually says that
14 the private code of redemption is an affirmative defense
15 that must be pled, so that has been held to be true, so
16 in this case, the fact that they don't assert it, it
17 should be barred, and we shouldn't even have argument on
18 it would be my position.

19 Now, obviously, I'll proceed to my argument
20 11:23AM as to why it should not apply, assuming that the Court
21 doesn't entertain the first argument, and I agree that
22 the *Lansdowne* case is the case that controls, and that
23 is the case that we must analyze, and looking at the
24 provisions of it, I would agree to a large extent that
25 the first four categories that my Brother mentioned are

1 undisputed.

2 As far as the for profit vs. not for profit,
3 it is under 501(c) a not-for-profit corporation, but
4 they certainly do operate, they charge substantial fees
5 for charities and other events to hold events there
6 upwards of \$250,000 per year they bring in in revenue as
7 a result of having these events, which are open to the
8 public, so I would submit that on the private vs. non
9 for profit, while it is classified as a not for profit,
10 it certainly does derive a profit by charging the public
11 to use their facility, and that holds true in a variety
12 of ways, which I'll get to when we talk about the member
13 exclusivity and access.

14 So, as far as the genuine selectivity, it is
15 undisputed, your Honor, that they have a very rigid
16 procedure for becoming a member. I admit that. That's
17 not enough though. If you look at the case law, it says
18 you have to be genuinely selective, which means you have
19 to be selective in who you're admitting beyond just
20 having to go through a procedure, so if you look at the
21 cases that are on that point, you know, they say -- give
22 me one second.

23 Genuinely selective on some reasonable
24 basis, and that's what it says. There has to be a plan
25 or purpose of exclusivity, which is what the *State of*

1 *New York vs. Ocean Club* case says, and in that case,
2 they said fees, limits on membership, formal admission
3 processes and recommendations required from other
4 members are not enough, you have to have something that
5 truly is selective, and although it sounds draconian in
6 a sense, cases that hold that there is sufficient
7 selectivity are cases where they exclude certain races,
8 certain religions, certain things like that where
9 there's an actual plan or purpose as to what they're
11:26AM 10 doing.

11 Another case that holds that is where there
12 was a requirement that the persons, I believe it's the
13 *Pappion* case, to become a member or to get something at
14 the club, you had to have an ownership interest in the
15 property.

16 A lot of the clubs down in Florida or even
17 up here, you have to live on the property to become a
18 member of the club. That's exclusivity. That's a
19 genuine criteria for becoming a member, you have to be a
11:26AM 20 certain person. You have to be in a certain
21 geographical area, you have to have a certain race, a
22 certain religion to become a member. That is a plan or
23 purpose.

24 Just saying that you have to go through a
25 process and your buddy has to vouch for you to become a

1 member at the club and say you're a good guy is not
2 enough.

3 THE COURT: Well, there's got to be
4 something in between, you know, what you're saying it's
5 more or less automatic in the sense that if I, you know,
6 like buying a bus ticket, all I have to do is show up
7 with my money and I get the ticket, that's your
8 position. It can't be that they're only protected if
9 they're racist. That can't possibly be right.

11:27AM 10 MR. LONGO: No, I'm not suggesting that.

11 THE COURT: And, obviously, I only know
12 about the Woodland Golf Club what I have read here, but
13 I would certainly be surprised if they literally would
14 admit anybody who showed up with the money.

15 You know, whether or not you play golf or,
16 you know, you are a convicted child molester, I don't
17 know what their standards are, but I imagine they have
18 some standards. They probably wouldn't admit me, not
19 knowing how to play golf and not having a Facebook page,
20 but there must be some standards here.

21 MR. LONGO: But just say if you're a child
22 molester, to take your Honor's example, that we're not
23 going to let you in, that's still not a plan or purpose
24 of who they're going to let in.

25 THE COURT: Well, it's a silly example, but

1 a lot of these clubs, you know, it seems to me, you
2 know, they want the right kind of person, whatever that
3 means, and that may include African-Americans or people
4 of different religious faiths and so forth, which maybe
5 it didn't, you know, 25 or 50 years ago.

6 Still, it just seems hard to believe that
7 they're not discerning in some way, that all that
8 matters is whether you have the \$55,000 and somebody
9 will vouch for you.

11:28AM 10 Is there any evidence in the record about
11 what percentage of people who apply were admitted or
12 what standards were used?

13 MR. LONGO: Yes. In fact, the club GM,
14 Mr. Garfinkel, says that basically if you get an
15 application, you usually get in and hardly anybody gets
16 rejected, so basically the process of, hey, I know
17 someone at your club, can I get a recommendation to get
18 in, if you do that and you have \$55,000 and you're not a
19 child molester, you get in.

11:28AM 20 There's no plan, there's no purpose, there's
21 no rationale except that you've got money, someone
22 vouches for you, you're in, and Mr. Garfinkel admits
23 that in his deposition and in his affidavits, so that's
24 undisputed.

25 There's no plan or procedure, there's no

1 genuine selectivity, it's just a process, your Honor,
2 and a process is not enough when you look at the cases.
3 So that's on that factor.

4 As far as the membership control over the
5 operations, they're saying that's undisputed. I would
6 disagree or it is disputed. Mr. Garfinkel himself
7 testified, if you look at his deposition, it was page 7,
8 line 18, the question was: "Do you have any ability to
9 make decisions without consulting with the board of
11:29AM 10 managers or Board of Directors, I should say?" His
11 answer was: "Operational decisions, although it's
12 not -- there's some decisions that I would -- I would --
13 I would probably involve operational decisions where I
14 would involve the Board of Directors."

15 "When you say operational decisions, just
16 define what you mean."

17 "Any decisions that would impact the
18 services, the amenities, the membership, the safety, the
19 well-being of the members generally. When I'm asking
11:30AM 20 questions, it's over expenses or legal matters."

21 So he's basically saying the only time he
22 asks the board, as he says here, "generally when I'm
23 asking questions, it's over expenses or legal matters."

24 Other than that, he's the man, he's in
25 charge, he does everything. Yes, they have by-laws that

1 say all these things that's supposed to happen. They
2 have committees that decide certain things, but the
3 day-to-day operations of the club, it's Mr. Garfinkel
4 who's in charge, and he makes most of the decisions by
5 himself.

6 THE COURT: But that has to apply to every
7 country club, every yacht club, you know, every
8 university-type club in the country, doesn't it, I mean,
9 somebody has to be running things day-to-day, that
11:30AM 10 members, you know, have jobs and other lives. They
11 can't be in charge of hiring and firing and whether the
12 lawn is mowed and all that kind of thing, right, what's
13 unusual about that?

14 MR. LONGO: Well, the fact that he does it
15 without even consulting them though is key here. He's
16 making decisions that impact upon the club. In fact,
17 one of the decisions he made was with regard to the
18 website, and I'll get to that in a second, but he's in
19 charge, he's making decisions that are impacting the
11:31AM 20 club, and in this case that impacted the potential
21 liability of the club when you look at the website and
22 the content that was on it and that he admitted he put
23 on and he admitted was taken off because of this
24 lawsuit, and he was in charge of all those things, and
25 he opened them up in our opinion to liability in this

1 case by putting those things on the web.

2 He admits that he's in charge of his
3 Facebook page, so he made all of these decisions, and
4 those are the decisions that do not allow the private
5 club exemption to apply in the case, and it was
6 Mr. Garfinkel who did that himself.

7 In fact, when Mr. Farina who was the club
8 president during the time where a lot of these events
9 were happening in 2014 was testifying he was shown
11:31AM 10 certain documents and letters that had been drafted by
11 Mr. Garfinkel and sent to Mr. Chervinsky, who was the
12 member who made the request and sent to Mr. Apria, who
13 was the person at the Mass. Office of Disability, and we
14 asked Mr. Farina, "Did you see these letters?" And he
15 said, "No."

16 I asked him, Did you think, and I'm
17 paraphrasing here, but, you know, did you think it was
18 unusual that your club GM would be sending letters out
19 that you as the president didn't see? He said, yes, I
11:32AM 20 am surprised by that or whatever the context was of what
21 he said, and that in and of itself was indicative of the
22 fact that he was doing these things, he was talking to
23 the Mass. Board of Disability, he was talking to
24 Mr. Chervinsky. He was making decisions that impacted
25 the club without consulting the board, without

1 consulting the president, and without consulting most of
2 the people involved in the process. So, that's on that
3 point, your Honor, as far as the membership.

4 Now, the biggest issue in this case and I think
5 the one that certainly tips the scale in favor of the
6 fact that the exemption does not apply is the access to
7 the club by nonmembers.

8 Now, first and foremost, they had a website
9 when this lawsuit was commenced, and it's part of our
11:32AM 10 motion, and it's part of the opposition to theirs. It's
11 the old website, and it's Exhibit F to our motion, and
12 basically what that website says, and this is what the
13 website was when this lawsuit was commenced.

14 It has a tab, it said, "Banquets," and it
15 says, "At Woodland, creating memorable events is our
16 specialty. Our array of well-appointed banquet
17 facilities, intimate meeting rooms and private function
18 areas combined with our exceptional culinary staff offer
19 unlimited choices for a variety of special events,
11:33AM 20 including weddings, rehearsal dinners, holiday
21 celebrations and other special occasions. We pride
22 ourselves on delivering impeccable quality and
23 uncompromising service with a talented team of wedding
24 and event specialists on hand to assist with every
25 detail. For information, contact," and it gave two

1 peoples' names who were not the general managers to
2 contact the club. This was on the website, and that's
3 what was available to the public when this lawsuit was
4 commenced.

5 They are certainly soliciting and inviting
6 the public to come to their club. They also had
7 another --

8 THE COURT: But apparently they never did, I
9 mean, at least according to --

11:33AM 10 MR. LONGO: Well, yes, according to
11 Mr. Garfinkel, he says, "Well, yeah, we never did any of
12 that." But it was on there, it was there, and, in fact,
13 they took it down, your Honor, they took it down after
14 this lawsuit was commenced, and when he was asked,
15 "Well, why did you take it down?" He said, "Because of
16 the lawsuit."

11:34AM 17 Then when asked, "Well, why was it there,
18 why was that language on the website?" He said, "It was
19 boilerplate language put there by the website
20 administrator."

21 Your Honor, there's no way that that
22 language was something that was boilerplate and made up
23 by a web designer. This was language put on the website
24 by Woodland at Mr. Garfinkel's direction, and he admits
25 that the content was his responsibility. And when

1 asked, "Well, gee, aren't you responsible? How could
2 you let something like that happen?" He said, "Well, I
3 guess I made a mistake."

4 He's the GM. He gets paid \$240,000,
5 thereabouts, a year to run this club, and for him to
6 make a flippant comment like, well, I guess it was a
7 mistake was ridiculous. It was clearly taken down to
8 avoid this lawsuit, and so he argues here before your
9 Honor that it was inaccurate, and that has to be
10 considered by the Court.

11 It also says on their website at the time
12 the lawsuit was commenced, there's a tab that said,
13 "Golf outings." And it said, "The next time you host a
14 golf outing, go to Woodland. Our breadth of experience
15 hosting U.S.G.A. and MGA tournaments and high profile
16 events for Fortune 500 companies' professional sports
17 teams, businesses, political groups, celebrities and
18 natural charitable organizations makes Woodland uniquely
19 qualified to make your golf outing special and unique."

11:35AM 20 "From tournament operations, social
21 functions, and merchandising to customized instructional
22 packages and customized catering, we deliver the
23 consummate golf experience in a unique setting."

24 This is what was on their website. This is
25 what they were portraying to the public, and that

1 probably did entice many charity groups as well as
2 private groups to use their facility.

3 Mr. Schroeder makes a comment that they only
4 had five weddings. If you look at the Facebook page and
5 the comments about Woodland, there's people who say,
6 "You did a great job with our rehearsal dinner," "We had
7 a great time at our event this weekend."

8 Besides weddings or doing rehearsal dinners,
9 they are doing all sorts of events at the club where the
11:36AM 10 public is invited to the club. The public parks in the
11 parking lot. They have handicapped spaces in the
12 parking lot. They have handicapped ramps to walk into
13 the building. They have handicapped things in the pool
14 area. They have handicapped access to get behind the
15 bar. They even have handicapped access to go to the pro
16 shop.

17 So Mr. Lobel is allowed to or encouraged to
18 go to the pro shop, but he can't use the golf course.
19 When they invite members of the public or they invite
11:36AM 20 members to have access to the club and provide
21 handicapped access everywhere except to allow someone
22 who has a disability to use their golf course, they're
23 inviting the public, and they have to make the entire
24 facility accessible, not just the parts they want.

25 So, as far as the tournaments go, your

1 Honor, they have, it was about 29 tournaments over 2014,
2 2015. Those tournaments are hosted by, in our case,
3 there was an affidavit from the Newton Chamber of
4 Commerce. There's a website you go to to sign up.
5 Anyone can sign up for the charity event, go to the
6 website for the charity and sign up to play at Woodland,
7 any member of the public not sponsored by a member.

8 Typically these tournaments are called
9 "shotgun tournaments," which means there's 18 holes on a
11:37AM 10 golf course, basically a foursome goes out to each hole.
11 So, 4 times 18, your Honor, times 29. In the course of
12 those two years, there were probably about 1,000 people
13 or more who used that golf course who were not members
14 of Woodland, who were not invited by a member, and who
15 paid to use the course through a website. That is open
16 to the public. That is not indiscriminate use. That is
17 access by the public, it's a public accommodation, and
18 the private exemption does not apply, under the case
19 law, under everything.

11:37AM 20 The fact that they're saying *Martin* does not
21 apply, the *PGA vs. Martin* case, the ADA says that the
22 owner, lessee or operator of the golf course. Now, in
23 the *PGA vs. Martin* case, the PGA tour was held to public
24 accommodation because they were a lessor of the golf
25 course, so this case is directly on point because in

1 this case, Woodland is the owner and operator of the
2 golf course, so that case and all of the dicta and all
3 of the holdings of that case apply 100 percent to this
4 case and are proof that they are in place of public
5 accommodations.

6 That's what the United States Supreme Court
7 said, and in rendering that decision, the Court went
8 through a whole line of reasoning of how the ADA should
9 be applied, and when you look at the *Lansdowne* case,
11:38AM 10 that case was decided before the ADA. That case was
11 decided in 1989. The ADA was enacted in 1990.

12 In the *Lansdowne* case, they recognized that
13 you have to look at the intent of the statute, which
14 they were examining, in determining whether or not the
15 test and the factors applied.

16 In 1990, the ADA was enacted. In the *PGA*
17 *vs. Martin* case, the United States Supreme Court goes
18 through an analogy of how and why the American With
19 Disabilities Act was enacted and says how it's important
11:39AM 20 to be all inclusive to allow people to be involved in
21 social events. Golf is a social event. Golf is
22 something that people do.

23 The ADA was enacted to allow people with a
24 disability to be part of a social event, and in looking
25 at the *Lansdowne* factors, which I do not dispute are the

1 factors to be considered, you must consider, as they
2 said in *Lansdowne*, the rationale, the reasoning behind
3 the act that you're looking at, and, here, if you look
4 at the *Martin* case, the *PGA vs. Martin* case, it tells
5 you what the reasoning was behind the ADA enactment, and
6 it clearly tips the scales in favor of there not being a
7 private club exemption, especially when you look at the
8 access.

9 Now, besides the tournaments that they've
11:39AM 10 mentioned, where they are member-sponsored, they've also
11 held, they being Woodland, they held a Massachusetts
12 golf association event. This was not a member-sponsored
13 event, this was an event by the Massachusetts Golf
14 Association.

15 Members of the public were invited to watch
16 the event, to attend the event, to be spectators at the
17 event. They charged money, cash money, to the members
18 or the players of the tournament as well as the people
19 watching the tournament to purchase food, to purchase
11:40AM 20 beverages, so they were deriving income from the public
21 whom they invited to their course, open to everyone who
22 wanted to go. So that was that event.

23 In 2016, they held the Ouimet Tournament,
24 again, members of the public were invited to come to pay
25 cash for food. There's a case, the *Evans* case, which

1 I --

2 THE COURT: Ouimet or Ouimet, how do you
3 pronounce it?

4 MR. LONGO: Yes.

5 MR. SCHROEDER: Ouimet.

6 THE COURT: Go on.

7 MR. LONGO: I apologize. They hold that
8 tournament, your Honor, it's open to anyone who wants to
9 join the tournament, to play, and anyone who wants to
11:40AM 10 watch the tournament can go watch it at Woodland. The
11 public is invited to use the entire facility during the
12 event, the clubhouse, the parking lot, the golf course.
13 Everything is open to the public, your Honor.

14 All of these things cut strongly against any
15 argument that they do not allow access to their club by
16 members of the public. And, again, it's over 2,000,
17 over 3,000 nonmembers who have probably been on that
18 course over the last five years, paid cash for things,
19 everything else.

11:41AM 20 As far as advertising goes, your Honor, and
21 advertising for members, even though they have changed
22 the website, if you go to the website today, there's a
23 tab that says "membership," and when you click on it, it
24 talks about membership. It says, For more information
25 about membership, contact David Garfinkel, the club

1 general manager, and there's a whole form you can fill
2 out to enter your information so you get information
3 about membership.

4 That is advertising for membership. If
5 that's not advertising for membership, your Honor, I
6 don't know what is. The club does have a public and a
7 private website. The public website is advertising and
8 talking about membership and inviting members to send an
9 e-mail to the club general manager to get information
10 about becoming a member. That's advertising for
11 membership.

12 The Facebook page, I understand your Honor
13 is not --

14 THE COURT: I know how it works. It's one
15 of the benefits of being a Judge, you get life tenure,
16 and you don't have to have a Facebook page.

17 MR. LONGO: So if you go on Facebook, your
18 Honor, there's public pages, there's private pages. The
19 only reason to have a public Facebook page is because
20 you want people to see things.

21 Now, their argument is, oh, we just used it,
22 it was public, sure, but we just used it to let our
23 members know what's going on. Well, your Honor, you can
24 have a private Facebook page and still do that. All you
25 have to do is as the private owner or private

1 administrator of that Facebook page, you invite people
2 to that page or they can request permission to see the
3 page, and once they say yes, they're allowed to see that
4 information.

5 Now, in order to get the information from
6 Facebook, in other words, if a member of Woodland wants
7 to get updates on what's for dinner that night and the
8 club hours, they have to do something affirmative, they
9 have to like the page in order for that page to show up
11:43AM 10 on their feed, so Woodland could very easily have made
11 it a private page where someone had to gain access to
12 it, and then they would get the same exact feed they get
13 as a public page but they chose to make it public. Why?
14 Because it's advertising.

15 If you look at the content of that page, it
16 talks about how they're a diverse club, they're an open
17 club, they are a wonderful club. There are comments
18 about people who have had events there and how great the
19 events were. That's advertising, your Honor. It's
11:43AM 20 advertising for members, it's advertising for people to
21 host events at the club. It is all of that, and for
22 them to say it's not is disingenuous.

23 Just to go back very quickly, your Honor,
24 I'm sorry, there was the *Evans* case, *Evans vs. Laurel*
25 *Links*, which I cite. In that case, they said that a

1 club made \$27,000 from serving food at its restaurant to
2 the public that opened the club up and made it a place
3 of public accommodation or they moved it from the
4 private club exemption, so with respect to the
5 tournaments where they're charging cash for people to
6 purchase things at the club, that case holds and voids
7 out the private club exemption.

8 So with respect to all those things, with
9 respect to the fact that it's an affirmative defense
11:44AM 10 that wasn't pled, I would submit to the Court that the
11 private club exemption does not apply to Woodland in
12 this case.

13 MR. SCHROEDER: Your Honor, may I have a
14 quick rebuttal?

15 THE COURT: Yes, very quick.

16 MR. SCHROEDER: I'll try to be very quick,
17 your Honor. Let me deal with the affirmative defense
18 issue first. If you look at the amended complaint as
19 well as Woodland's answer, the amended complaint in this
11:44AM 20 case puts the private club exemption front and center.

21 In fact, paragraph 4, "Although Woodland is
22 a "private" country club, they host, sponsor, solicit
23 and allow members of the general public access to the
24 club and golf course for charity and corporate golf
25 events."

1 Paragraph 5 goes into, "By soliciting
2 business from nonmembers, advertising their services and
3 accommodations to the public and allowing nonmembers
4 into and onto the premises for commercial purposes,
5 Woodland is deemed a public entity for purposes of the
6 ADA."

7 That is further annunciated in paragraphs
8 22, 23, 24, 27 of the complaint. All of those
9 allegations are denied by Woodland in this case, and we
11:45AM 10 do -- not only do we deny them, but we do affirmatively
11 state that Woodland is a private club, and so I would
12 submit, your Honor, that that was put front and center
13 as a defense to this case because it was pled in the
14 complaint.

15 In fact, if you look at the *McDermott*
16 *V. FedEx Ground Systems* case, it's a D. Mass. case from
17 2007, the defendants did not list lack of personal
18 jurisdiction under the affirmative defense heading,
19 however, defendants denied the allegations in the
11:46AM 20 complaint that asserted that the Court had jurisdiction,
21 and the Court held that defendants effectively raised
22 the defense in their answer. I think that is a red
23 herring in that regard, your Honor, and doesn't deserve
24 any further consideration. With.

25 Respect to the four factors that Mr. Lobel

1 went over, just very briefly, the *Lansdowne* genuine
2 selectivity case, he cites to *Lansdowne* as well as *Ocean*
3 *Club*. *Lansdowne* stated that the club did not
4 investigate the background, character, or financial
5 status of the applicants.

6 The *Ocean Club* case stated, "Application for
7 membership is uninformative. It seeks only the name and
8 address of the applicant, type of business, names of
9 immediate family, listing of two club members as
10 references."

11 I'd submit, your Honor, that the maze or
12 gauntlet, the procedural gauntlet that people have to go
13 through to get into the club and to be vetted by the
14 club is how much more onerous than anything that is
15 annunciated in the *Lansdowne* case or the *Ocean Club* case
16 where they rejected the private club exemption.

17 With respect to the membership control of
18 operations, the critical issue before the Court on
19 plaintiff's motion is the issue of denying use of the
11:47AM 20 SoloRider on the bunkers and greens, and for the reasons
21 stated previously, the general manager was just one part
22 of that process, and I think the reality of how that
23 played out demonstrates that the general managers, like
24 general managers at any club, has some involvement but
25 doesn't have ultimate say.

1 And, in fact, it's undisputed, and
2 David Mucciarone, who's the green superintendent, was
3 deposed that he, in fact, has basically carte blanche
4 over the greens and the golf course.

5 THE COURT: I saw the movie *Caddyshack*. Is
6 that relevant here? Should I make that part of the
7 record?

8 MR. SCHROEDER: Yes. Actually,
9 interestingly, Mr. Mucciarone has been affiliated with
10 the club I think for like 55 years. I would not -- I
11 would say that he's got a lot more sophistication than
12 Bill Murray, but there's no doubt, he's been with the
13 club, his father was with the club as the greens
14 superintendent. He's been with the club since like he
15 was 14. He controls how the greens are kept, how the
16 fairways are manicured, not Mr. Garfinkel.

17 With respect to Number 3, access by
18 nonmembers and this whole issue of the advertising,
19 there's no doubt that they did not really spend much
11:48AM 20 attention to their website and what was on it.

21 If you look at the website, it kind of looks
22 pretty boilerplate-like and could be used at any number
23 of clubs, and if you look at any other number of clubs,
24 it looks pretty similar except for the fact that in
25 reality, in reality, this club didn't do what was on

1 that website page at the time. It only had five
2 member-sponsored weddings in total over two years.

3 As far as the golf events, the member
4 sponsors, if somebody reaches out to the club, it's
5 undisputed, if somebody reaches out to the club, whether
6 it's through the public website tab that's on there to
7 Mr. Garfinkel, it's undisputed that Mr. Garfinkel's
8 response is we don't host outside events, you need to
9 have a member sponsor to host outside events, case
11:49AM 10 closed. There's no additional discussion like, oh,
11 maybe I can get you a member sponsor, there's no back
12 and forth at the end of the day.

13 The website is what it is. That's what it
14 was. It was not accurate. It's undisputed that it's
15 not accurate, Mr. Garfinkel testified as much, and that
16 no revenue was received by the club as a result of
17 having that.

18 With respect to advertising and the public
19 Facebook page, it's pretty clear that this is not a very
11:50AM 20 sophisticated operation in terms of their knowledge of
21 social media and whether or not you can make a page
22 private or public.

23 The bottom line is they have a public
24 Facebook page, undisputed, but they also have a private
25 website for members as well, and that's undisputed as

1 well, and I think when you look at all eight factors,
2 and they are cumulative, and even plaintiff's counsel
3 concedes, you have to look at all eight, and not one is
4 more weighted than the other ones.

5 When you look at all eight, there's no
6 question beyond a genuine dispute of fact here that
7 Woodland is entitled to the private club exemption under
8 Title III of the ADA.

9 THE COURT: Thanks. I want to touch quickly
11:50AM 10 about the cart. All right, go ahead, Mr. Lobel.

11 MR. LONGO: Thank you. Should I proceed on
12 my motion?

13 THE COURT: Yes. Let's try to bang through
14 this quickly. Obviously, I've read the papers, but why
15 don't you hit the highlights for me.

16 MR. LONGO: Sure. Your Honor, basically the
17 ADA Title III states that, "No individual shall be
18 discriminated against on the basis of a disability and
19 the full and equal enjoyment of the goods, services,
21 facilities, privileges, advantages, or accommodations of
22 any place of public accommodation by any person who
23 owns, leases or leases to or operates a place of public
24 accommodation."

24 The statute then goes on to define that a
25 golf course is in fact a place of public accommodation.

1 In this case, there's no dispute, and there has been no
2 argument raised to dispute it that Mr. Lobel is disabled
3 within the meaning of the ADA, so in order to prove an
4 ADA claim, a prima facie claim and prove that claim, you
5 have to prove essentially four things: That the
6 plaintiff is disabled, undisputed; that the defendant is
7 a private entity that owns, leases or operates a place
8 of public accommodation, again, undisputed; and they're
9 obviously claiming that they're exempt from that, but it
10 is undisputed that they do that.

11 Again, it's an affirmative defense, so as
12 far as the plaintiff's prima facie case and establishing
13 that the defendant is a private entity that owns and
14 operates a place of public accommodation, they do. It's
15 a defense to that, but my prima facie proof has been
16 established.

17 The defendant employed a discriminatory
18 policy or practice. They have. He needs to have access
19 to the golf course, and the defendant discriminated
11:52AM 20 against the plaintiff based upon his disability, and to
21 look at that and to determine that, you have to say --
22 there has to be request for a reasonable modification of
23 the policy of the club, so here the policy of the club
24 was to prohibit a SoloRider, which is an adaptive golf
25 cart access to the greens and bunkers of their course.

1 The request was made to allow that, and the
2 request was denied. You also have to show that the
3 request was necessary. Now, it was clear when you look
4 at Mr. Lobel's testimony that he needs a SoloRider.
5 There was some talk, and my Brother, you know, beat the
6 issue to death with Mr. Lobel, for lack of a better
7 term.

8 He kept asking him, "Well, you did offer to
9 try, didn't you?" And Mr. Lobel admitted, "Yeah, I
11:53AM 10 might have said that to the Office of Mass. Disability,
11 but the fact of the matter is I can't, I have tried, I
12 can't," so his testimony unequivocally is that he cannot
13 play golf, he cannot putt a golf ball, he cannot shoot
14 out of a bunker using his crutches. He can't do it. He
15 doesn't have the balance, he doesn't have the stability.
16 It is necessary for him to have a SoloRider.

17 The request is reasonable because he uses it
18 everywhere, your Honor, except Woodland. He uses at
19 private clubs in Massachusetts, private clubs in
11:54AM 20 Florida, private clubs in Arizona. He uses it at public
21 courses all over the place. He uses it at Granite Links
22 all the time. He uses it. It's a reasonable request.

23 The machine itself is designed to minimize
24 its impact upon a green. There are tests that showed as
25 part of the expert package that is part of the Court's

1 record that when you do a PSI test, which is pounds per
2 square inch, the pounds per square inch exerted on a
3 surface by a SoloRider is less than a golf cart.

4 I submit to the Court that a golfer who
5 weighs 400 pounds, 300 pounds, 200 pounds and is
6 standing on a golf green with one foot and turns and
7 pivots to walk away, he will do more damage pivoting his
8 foot and walking off that course than the SoloRider will
9 ever do to a golf course, and if you look at our
11:54AM 10 expert's opinion, he talks about that, and if you look
11 at the literature, it talks about that.

12 So as far as whether or not the request was
13 reasonable, it was 100 percent reasonable, and if you
14 look at all of the factors, he has satisfied all of
15 them, and plaintiff is entitled to summary judgment
16 because they've established their *prima facie* case.

17 Now, obviously, they've raised defenses, and
18 I don't know if your Honor wants me -- one of them is
19 the private club exemption, which I think we've talked
11:55AM 20 about exhaustively already, and the other is the
21 fundamental alteration.

22 THE COURT: Why don't you talk about that.

23 MR. LONGO: As far as whether or not if you
24 look at the statute again, it says, "by any person who
25 owns it," and then it says, "that the failure to make a

1 reasonable modification and policies, practices or
2 procedures when such modifications are necessary to
3 afford such good services, facilities, privileges and
4 advantages or accommodations to an individual with a
5 disability," so, again, we've established that unless
6 the entity can demonstrate that making such
7 modifications would fundamentally alter the nature of
8 the goods, services, facilities, privileges and
9 advantages.

11:55AM 10 Now, again here, your Honor, and I'm not
11 going to go exhaustively into it, but the fundamental
12 alteration is also an affirmative defense, which they
13 didn't plead, they pled undue burden. Undue burden is
14 different than fundamental alteration, but, again, I'll
15 rest on the argument that we made previously on that
16 issue.

17 If you look at what the fundamental
18 alteration is in this case, we have a test, which they
19 say they conducted that they say caused damage to their
11:56AM 20 green, and that's basically what we have as to why it's
21 a fundamental alteration, and based on that test,
22 they're saying we're not going to allow a SoloRider on
23 our green.

24 When they did the test, they never, first of
25 all, they took I think it's five or six pictures, your

1 Honor, and you have them in the record, show something
2 on a piece of grass.

3 Now, their witnesses testified that what it
4 shows was damage that they're alleging was caused by a
5 SoloRider, but the pictures speak for themselves, the
6 testimony speaks for itself.

11:57AM

7 If you look at the testimony of the five
8 individuals who were at that test, and it's in my brief,
9 and it's in the deposition transcripts are there, your
10 Honor, the five people who took part in this test gave
11 five completely different versions of how the test
12 occurred.

13 I submit to the Court that if you're going
14 to conduct a test, you know, you've been talking to the
15 Mass. Office of Disability, you know that they're
16 alleging that you're violating the ADA, they being the
17 Mass. Office of Disability, you know all of this, and
18 then you decide to conduct a test.

11:57AM

19 Now, Mr. Lobel and Mr. Chervinsky offered to
20 take part in the test. Mr. Lobel offered to operate the
21 cart so he can demonstrate how he would operate it on a
22 green so that the test simulates how Mr. Lobel or any
23 disabled golfer would operate the SoloRider.

24 Woodland refused. They said no, and they
25 conducted a test with just the five of them,

1 Mr. Mucciarone, who has been there for however many
2 years, the club president, Mr. Garfinkel, they all did
3 this little test, and they took one picture that shows
4 something on a piece of grass, and based upon that,
5 they're saying it fundamentally alters the green.

6 Now, when they were asked at depositions
7 whether or not they had a ball with them that day, "In
8 other words, well, when you did the test, did you see
9 whether or not it affected ball roll?" "No."

11:58AM 10 "Did you make any repairs to the greens
11 afterwards?" "No."

12 "Did you have to suspend play that day
13 because there was damage to the greens?" "No."

14 "Did you get any complaints from anybody?"
15 They did the test while the course was open that day.

16 "Did you get any complaints from anybody
17 that day about damage to the greens?" "No."

18 So, here they are, they come into this court
19 saying that the SoloRider's operation on the green
20 fundamentally altered the course, that we cannot allow
21 it, yet they made no repairs, they got no complaints,
22 nothing, your Honor. They kept the course open. They
23 drove it on, they drove it off, they took the picture
24 allegedly, and they said no, we're going to deny access
25 because it fundamentally alters our course.

1 There is no proof in this case that driving
2 that cart on that green will or did fundamentally alter
3 their golf course. It's just not here, your Honor.
4 They're going to say they have a picture, they're going
5 to say they have testimony that it tore the green, that
6 it damaged the green.

7 If you look at the picture, your Honor, to
8 me it looks like grass got bent. If I step on a green
9 or I step on any grass, I put my foot down on it and I
11:59AM 10 pick my foot up, there's going to be a mark. Their
11 expert, their own expert even testified to that. He
12 goes, "Yeah, it's called bounceback."

13 I don't remember what exactly he said, your
14 Honor, but basically if you step on a surface, it's
15 going to make an imprint, and then if you walked away
16 and came back 20 minutes later, 9 out of 10 times,
17 you're not going to notice that the mark was there.

18 My expert testified that when he does
19 maintenance on the course, he drives vehicles across the
11:59AM 20 green, and it will leave a mark, and in 20 minutes, 30
21 minutes, it's gone. They testified, Mr. Mucciarone and
22 Mr. Donadio, who's the assistant superintendent, that
23 they drive machinery on those greens all the time. They
24 drive a tri-flex mower, which weighs much more than the
25 SoloRider on the green three times a week. They drive a

1 sprayer, which weighs about four times or three times
2 the amount of a SoloRider. It has big tires on it.
3 They drive it on the green every 6 to 10 days, not a
4 problem.

5 Mr. Donadio said that in fact there was a
6 mark to be left by one of these machines. He said it
7 typically doesn't happen, but if it were to happen, all
8 we have to do is roll the green, and it's gone.

9 I submit that even if the SoloRider were to
12:00PM 10 make a mark on their greens, and I submit it does not,
11 because Mr. Lobel testified and Mr. Chervinsky testified
12 that he uses it all the time, they've never seen any
13 damage caused by it, but if in fact it did leave a mark,
14 and when I say a mark, I mean a mark that lasts beyond
15 five minutes, your Honor.

16 Again, you might be able to tell that it
17 drove on the green because even if you walk across the
18 green, you can tell that someone has just walked across
19 the green, but whether or not that fundamentally altered
12:01PM 20 the nature of the course and made it unplayable for
21 other people, there's no proof of that, none whatsoever,
22 except self-serving statements by people who conducted a
23 closed test.

24 They didn't test it for ball roll, they
25 didn't test it for anything, they made no repairs,

1 nothing. They got no complaints. There's just no
2 evidence that this cart would fundamentally alter their
3 course, and the only basis for denying his reasonable
4 request for a modification was this test, and there's no
5 evidence to demonstrate that it's a fundamental
6 alteration of their course.

7 Again, all of the vehicles that they use,
8 the golfers, the amount of golfers that walk on that
9 course every day during a tournament, I mean, these
12:01PM 10 people, if the average golfer weighs between 100 and 200
11 or 200 and 250 pounds, they are exerting pressure on
12 that course all the time, mowers.

13 These greens are designed to withstand
14 traffic. They're designed to withstand balls flying
15 onto them and landing. They're designed to withstand
16 somebody getting upset when they miss a putt and
17 pounding their putter into the ground.

18 They do get damage from time to time from
19 the normal course of use, and when it happens, they roll
12:02PM 20 it, they do some maintenance, and it's taken care of,
21 and it doesn't affect them. It doesn't fundamentally
22 alter the course, and allowing a SoloRider, an
23 especially-designed machine, onto a green is not going
24 to fundamentally alter their course, and there's no
25 testimony to that at all.

1 THE COURT: Okay. Thank you.

2 Mr. Schroeder, quickly, and, I'm sorry, I do have
3 another commitment. That's the only reason I'm cutting
4 this a little short.

5 MR. SCHROEDER: Since I'm from New Jersey, I
6 speak quickly as it is, so I'm going to try to adhere to
7 that.

With respect to the affirmative defense, the affirmative defense, Woodland asserted that the requested accommodation is not feasible under the ADA, and the requested accommodation is an undue burden under the ADA. Those are things that were stated in Woodland's affirmative defenses.

14 If you look at the *McNally vs. Prison Health*
15 *Services* case, a D. Maine case in 1999, "The defendant
16 may raise the affirmative defense that the requested
17 accommodation of the plaintiff's disability would
18 constitute an undue burden."

1 the discovery, all of the depositions went into this
2 issue as well, "fundamental alteration."

3 In fact, plaintiff's counsel, Mr. Longo,
4 just annunciated the fact that he asked questions that
5 went to the issue of fundamental alteration, ball roll,
6 et cetera, so with respect to that issue, I would submit
7 that, once again, Woodland satisfied its obligations
8 under the law with respect to how it pled in its answer
9 and responses and affirmative defenses.

12:04PM 10 With respect to the issue of discrimination,
11 you have the issue of whether or not it's reasonable,
12 whether or not it's necessary and whether or not it
13 would fundamentally alter.

14 We purposefully didn't submit a motion on
15 this subject, the actual motion for summary judgment on
16 this subject because we heeded the Court's instruction
17 during one of your conferences, which is don't put a
18 whole omnibus motion in if in fact I'm going to be
19 hearing this case as a bench trial anyway, so we didn't,
12:04PM 20 but there is a factual dispute with respect, and here's
21 why:

22 There's a factual dispute with respect to
23 whether or not this was necessary, Number 1; and,
24 Number 2, there's a factual dispute with whether or not
25 it would fundamentally alter the nature of the bunkers

1 and/or greens.

2 Let me start with the basic facts of what
3 Woodland did allow for purposes of a reasonable
4 accommodation. Woodland was willing to allow Mr. Lobel,
5 a guest of a member, to use a SoloRider in the tee box.

6 Woodland was willing to allow Mr. Lobel
7 through a member to use the SoloRider on fairways and
8 greens, I'm sorry, fairways and roughs and also the
9 approach to the green.

12:05PM 10 So even though there is a red flag program
11 where certain members of the club can go up closer to
12 the green than other golfers, there was an allowance to
13 go all the way up to the edge onto the approach to the
14 green for Mr. Lobel.

15 THE COURT: I mean, if he can't putt, how
16 can he play?

17 MR. SCHROEDER: Well, I would --

18 THE COURT: Unless he's really good.

19 MR. SCHROEDER: Well, let me address that
12:05PM 20 answer, your Honor. When we started discovery in this
21 case, one of the initial e-mails that was redacted for
22 attorney-client privilege was an e-mail that I
23 eventually got from Mr. Chervinsky, and in that e-mail,
24 it highlights the fact, and this goes, I think, to what
25 was necessary for Mr. Lobel to putt.

1 It is an e-mail from Mr. Chervinsky to
2 Mr. Lobel, and, like I said, Mr. Lobel did not produce
3 this e-mail under the cloak of attorney-client
4 privilege, and this is in August of 2014.

5 Mr. Chervinsky to Mr. Lobel: "FYI, I know
6 that you suggested to the state official that you'd be
7 willing to keep the SoloRider off the green and putt
8 using crutches. I do not think that's a good idea, nor
9 do I think that it should be necessary, so let's not
12:06PM 10 push that too much in future communication, okay? I'm
11 willing to compromise and stipulate that you'll stay out
12 of the bunkers. Who really cares about that? But it's
13 my contention that you must be allowed to putt on the
14 SoloRider because unlike with bunkers, one cannot play
15 golf if one cannot hole out."

16 In fact, Mr. Lobel testified when I asked
17 him, "Have you ever tried to do it with just one crutch
18 and putters, which weighs only a few ounces?" "Yes."

19 When I asked him specifically when he tried
20 to do it himself, he couldn't answer that. He said,
21 "Who knows?" I asked him a couple times. I'd submit,
22 your Honor, that whether or not it was necessary that
23 Mr. Lobel had to go onto the green with a SoloRider is a
24 factual dispute that should be left to a bench trial.

25 Let me just address at least initially the

1 issue of even the SoloRider itself. In plaintiff's
2 brief, they submit that Woodland is required to provide
3 a SoloRider, so set aside whether or not he gets to go
4 on the greens and bunkers, and I'll get to that in a
5 second, there is no request ever in any of the e-mails
6 which we finally got from Mr. Chervinsky or anyone else
7 on behalf of Mr. Lobel -- Mr. Lobel had no
8 communications with Woodland, that's undisputed. The
9 only communication came from Mr. Chervinsky, a member of
10 the club.

11 There is not one instance where
12 Mr. Chervinsky or anyone else that could have been
13 acting on behalf of Mr. Lobel ever asks for a SoloRider
14 to be provided, and, in fact, Mr. Chervinsky and
15 Mr. Lobel both testified to the fact that Mr. Lobel has
16 got a SoloRider that he doesn't really own but he has
17 kind of carte blanche to it down at Granite Links.

18 And, in fact, there's an e-mail back and
19 forth for a different course where Mr. Chervinsky says
12:08PM 20 to this woman he can easily transport his SoloRider so
21 the club need have no worries about supplying one, so
22 I'd submit as a threshold matter, there's now this
23 request, well, Woodland, they have to provide a
24 SoloRider, one that was never requested, and under the
25 law, if you don't request something as a reasonable

1 accommodation, you certainly can't be held liable for
2 not providing it in the first place.

3 And the record is replete with examples of
4 the fact that Mr. Lobel has the use of a SoloRider, and,
5 therefore, now seeking one in this proceeding at this
6 point, well beyond the stage of when this happened, is
7 inappropriate, and it's not a reasonable accommodation
8 because it's not necessary.

9 THE COURT: I'm going to cut you short.

12:09PM 10 Again, I think it's well and thoroughly briefed, and I'm
11 going to take it under advisement, but I'm afraid I've
12 run out of time, so I will take it under advisement.

13 If you think that something has come up here
14 that you haven't had a fair chance to respond to, I will
15 permit the filing within one week of very brief
16 supplemental memoranda, you know, addressing a
17 particular argument or calling attention to a particular
18 case if you think you haven't had a chance to fairly
19 address it, but otherwise I'm going to have to cut it
20 short.

21 Thank you. It was very well argued on both
22 sides, and I'll take the matter under advisement.

23 MR. LONGO: Thank you, your Honor.

24 MR. SCHROEDER: Thank you, your Honor.

25 THE CLERK: All rise.

C E R T I F I C A T E

5 UNITED STATES DISTRICT COURT)

6 DISTRICT OF MASSACHUSETTS) ss.

7 | CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 59 inclusive, was recorded
by me stenographically at the time and place aforesaid
in Civil Action No. 15-13803-FDS, ROBERT LOBEL vs.
WOODLAND GOLF CLUB OF AUBURNDALE and thereafter by me
reduced to typewriting and is a true and accurate record
of the proceedings.

16 Dated February 24, 2017.

18 s/s Valerie A. O'Hara

20 VALERIE A. O'HARA

21 OFFICIAL COURT REPORTER

21 OFFICIAL COURT REPORTER